IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Hambange Don Dudly
Wanshapala,
Padmagiri,
Maggona.
2nd Defendant-Appellant-Petitioner

CA Case No: CA/RI/11/2018
HC Case No: WP/HCCA/KAL/11/2009/F
DC Kalutara Case No: 4946/L

Vs.

Madawala Maddumage Don
Ariyarathna,
No. 36,
Gamagoda,
Kalutara.
Plaintiff-Respondent-Respondent
Dewamuni Sugathapala,
Gomarakanda,
Payagala.
1st Defendant-Respondent-Respondent

Before: Mahinda Samayawardhena, J.

Counsel: Prinath Fernando for the Petitioner.
Respondents are absent and unrepresented.

Supported &
Decided on: 05.12.2018

Samayawardhena, J.

The 2nd defendant-appellant-petitioner (petitioner) filed this application before this Court on 18.05.2018 for revision and *restitutio in integrum* seeking to set aside the Judgment of the Provincial High Court of Civil Appeal of Kalutara, pronounced more than two years ago from that date, to be specific on 10.08.2016.

According to Article 154P of the Constitution introduced by the 13th Amendment, there shall be a High Court for each Province. The High Court of the Provinces (Special Provisions) Act, No.19 of 1990, made provisions regarding the procedure to be followed in, and the right to appeal to and from, such High Court, and for matters connected therewith. By this Act, the High Courts of the Provinces were given original criminal jurisdiction as well as appellate jurisdiction basically against the Judgments and Orders of the Magistrates' Courts, Primary Courts and Labour Tribunals of the relevant Provinces.

By the High Court of the Provinces (Special Provisions) (Amendment) Act, No. 54 of 2006, sections 5A, 5B and 5C were introduced to the aforesaid Principal Act, No. 19 of 1990. This

was done to confer appellate and revisionary jurisdiction to the said Provincial High Courts against Judgments and Orders of the District Courts of the relevant Provinces. Those Provincial High Courts exercising civil appellate jurisdiction are conveniently known as Provincial High Courts of Civil Appeal.

After the said amendment by Act No. 54 of 2006, section 5A of the Principal Act, No.19 of 1990 (without the proviso) reads as follows:

> *5A(1) A High Court established by Article 154P of the Constitution for a Province, shall have and exercise appellate and revisionary jurisdiction in respect of judgments, decrees and orders delivered and made by any District Court or a Family Court within such Province and the appellate jurisdiction for the correction of all errors in fact or in law, which shall be committed by any such District Court or Family Court, as the case may be.*
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> *(2) The provisions of sections 23 to 27 of the Judicature Act, No. 2 of 1978 and sections 753 to 760 and sections 765 to 777 of the Civil Procedure Code (Chapter 101) and of any written law applicable to the exercise of the jurisdiction referred to in subsection (1) by the Court of Appeal, shall be read and construed as including a reference to a High Court established by Article 154P of the Constitution for a Province and any person aggrieved by any judgment, decree or order of a District Court or a Family Court, as the case may be, within a Province, may invoke the jurisdiction referred to in that subsection, in the High Court established for that Province:*

According to section 5A(2) quoted above, it is clear that, the procedure to be adopted in the Provincial High Court of Civil Appeal is the same procedure which is being adopted in the Court of Appeal.

Section 5C deals with the subject of appeals from the Judgments and Orders of the Provincial High Court of Civil Appeal. According to this section, there is only one direct appeal to the Supreme Court, with leave obtained, against the Judgments and Orders of the Provincial High Court of Civil Appeal. That section reads as follows:

> *5C (1) An appeal shall lie directly to the Supreme Court from any judgment, decree or order pronounced or entered by a High Court established by Article 154P of the Constitution in the exercise of its jurisdiction granted by section 5A of this Act, with leave of the Supreme Court first had and obtained. The leave requested for shall be granted by the Supreme Court, where in its opinion the matter involves a substantial question of law or is a matter fit for review by such Court.*
>
> *(2) The Supreme Court may exercise all or any of the powers granted to it by paragraph (2) of Article 127 of the Constitution, in regard to any appeal made to the Supreme Court under subsection (1) of this section.*

The argument of the learned counsel for the petitioner is that, a party can come before this Court against the Judgment or Order of the Provincial High Court of Civil Appeal by way of revision and/or *restitutio in integrum* in terms of Article 138 of the Constitution.

If that argument is accepted, section 5C referred to above becomes meaningless, and the intention of the legislature will blatantly be defeated, as any party dissatisfied with any Judgment or Order of the Provincial High Court of Civil Appeal can come before this Court by way of revision and/or *restitutio in integrum*. Then the party dissatisfied with the Judgment or Order of the District Court will have three appeals—first to the Provincial High Court of Civil Appeal, second to the Court of Appeal, and third to the Supreme Court. That was obviously never the intention of the legislature. One of the main objectives of setting up Provincial High Courts of Civil Appeal is to curb laws delays in civil litigation and not to multiply it.

Article 138(1) of the Constitution (without the proviso) reads as follows:

> *The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law, an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by the High Court, in the exercise of its appellate or original jurisdiction or by any court of First Instance, tribunal or other institution and sole and exclusive cognizance, by way of appeal, revision and restitutio in integrum, of all causes, suits, actions, prosecutions, matters and things of which such High Court, Court of First Instance, tribunal or other institution may have taken cognizance*:

I am mindful of the fact that this Article 138 confers the jurisdiction to the Court of Appeal to correct "*all errors in fact or in law which shall be committed by the High Court, in the exercise of its appellate or original jurisdiction*". But it is significant to

note that this Article does not confer unrestricted, unfettered, absolute power for revision and *restitutio in integrum* on the Court of Appeal against Judgments and Orders of the High Courts. If I may repeat, it says: "*The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law, an appellate jurisdiction…..*"

"*Any law*" encompasses, *inter alia*, the Laws introduced by Act Nos. 19 of 1990 and 54 of 2006.

The question whether the Court of Appeal has jurisdiction to sit on Judgments and Orders made by the Provincial High Courts of Civil Appeal was particularly dealt with by Justice Salam (with Justice Rajapaksha agreeing) in the Court of Appeal case of *Stephan Gunaratne v. Thushara Indika Sampath [CA (PHC) APN 54/2013 (REV)]* decided on 23.09.2013.

That is a case where the plaintiff-petitioner in a partition action came before this Court by way of revision against the Judgment of the Provincial High Court of Civil Appeal at Ratnapura. Dismissing the application *in limine* without issuing notice, Justice Salam stated:

> *The question that now arises for consideration is whether the Court of Appeal can exercise its revisionary powers under Article 138 of the Constitution in respect of a judgment of the High Court pronounced under the Provisions of Act No 54 of 2006 when the proper remedy is to appeal to the Supreme Court. Appreciably, Section 5A of Act No 54 of 2006 quite specifically states that all relevant written laws applicable to an appeal, in the Court of Appeal are applicable to the High Court as well. This undoubtedly*

> *demonstrates beyond any iota of doubt that the scheme provided by Act No 54 of 2006 to facilitate an appeal being heard by the Provincial High Court is nothing but a clear transfer of jurisdiction and in effect could be said that as far as appeals are concerned both the High Court and the Court of Appeal rank equally and are placed on par with each other. Arising from this statement of law, it must be understood that if the Court of Appeal cannot act in revision in respect of a judgment it pronounces in a civil appeal, then it cannot sit in revision over a judgment entered by the High Court in the exercise of its civil appellate jurisdiction as well, for both courts are to be equally ranked when they exercise civil appellate jurisdiction.*

A similar conclusion was reached by the Supreme Court in *Balaganeshan v. OIC, Police Station, Seeduwa (SC SPL/LA No. 79/2015)* decided on 01.04.2016 in interpreting similar provisions found in the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990.

That is a criminal case where the accused unsuccessfully appealed to the Provincial High Court against the Judgment of the Magistrate's Court. Being dissatisfied with the Judgment of the Provincial High Court sitting in appeal, the accused appealed to the Court of Appeal in terms of section 138 of the Constitution. The Court of Appeal dismissed the appeal *in limine* on the basis of want of jurisdiction. Rejecting leave to appeal against that dismissal, Justice Dep (later Chief Justice) with Justice Wanasundera and Justice Jayawardena agreeing held that:

> *When the Provincial High Court exercises appellate jurisdiction, it exercises appellate jurisdiction hitherto exclusively vested in the Court of Appeal. It exercises a parallel or concurrent jurisdiction with the Court of Appeal. The High Court when it exercises appellate jurisdiction it is not subordinate to the Court of Appeal. That is the basis for conferring jurisdiction on the Supreme Court under section 9 of the High Court of Provinces (Special Provisions) Act No. 19 of 1990 to hear appeals from the judgments of the High Court when it exercises appellate jurisdiction. I hold that the Accused Appellant–Petitioner should have filed a Special Leave to Appeal application against the judgment of the High Court exercising Appellate Jurisdiction to the Supreme Court in the first instance instead to the Court of Appeal. The Court of Appeal correctly upheld the preliminary objection and rejected the Appeal.*

Hence I hold that the Court of Appeal has no appellate jurisdiction to set aside Judgments or Orders of the Provincial High Court of Civil Appeal by way of final appeal, revision or *restitutio in intergrum*. That is vested exclusively in the Supreme Court.

In *Jinadasa v. Hemamali [2011] 1 Sri LR 337* the Supreme Court held that the application for Special Leave to Appeal before the Supreme Court shall be filed within 42 days from the date of the Judgment of the Provincial High Court of Civil Appeal. This has admittedly not been done. Instead, the petitioner has filed a revision application before the Supreme Court, which has later been withdrawn (understandably for want of jurisdiction).

Hence the relief sought by the petitioner to set aside the Judgment of the Provincial High Court of Civil Appeal of Kalutara dated 10.08.2016 cannot be granted. This application is misconceived in law, and therefore liable to be dismissed *in limine*, without issuing notice to the respondents.

Notice refused. Application dismissed.

Judge of the Court of Appeal